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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[TD 9780]

RIN 1545-BN34

Election into the Partnership Audit Regime Under the Bipartisan Budget Act of 2015

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations pursuant to section 1101(g)(4) of the Bipartisan Budget Act of 2015 regarding an election to apply the new partnership audit regime enacted by that act to certain returns of a partnership. The regulations provide the time, form, and manner for making this election. The regulations affect any partnership that wishes to elect to have the new partnership audit regime apply to its returns filed for certain taxable years beginning before January 1, 2018.

DATES: Effective date: These regulations are effective August 5, 2016.

Applicability Date: For dates of applicability, see §301.9100-22T(e) and (f).

FOR FURTHER INFORMATION CONTACT: Jenni M. Black at (202) 317-6834 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Procedure and Administration Regulations (26 CFR part 301) to provide rules for the time, form, and manner of

making the election under section 1101(g)(4) of the Bipartisan Budget Act of 2015, Public Law 114-74 (BBA) with respect to returns filed for partnership taxable years beginning after November 2, 2015 and before January 1, 2018.

The BBA was enacted on November 2, 2015, and was amended by the Protecting Americans from Tax Hikes Act of 2015, Public Law 114-113, div. Q (PATH Act) on December 18, 2015. Section 1101(a) of the BBA removes subchapter C of chapter 63 of the Internal Revenue Code (Code) effective for partnership taxable years beginning after December 31, 2017. Subchapter C of chapter 63 contains the unified partnership audit and litigation rules that were enacted as part of the Tax Equity and Fiscal Responsibility Act of 1982, Public Law 97-248 (TEFRA). These partnership audit and litigation rules are commonly referred to as the TEFRA partnership procedures.

Section 1101(b) of the BBA also removes subchapter D of chapter 63 of the Code (containing audit rules for electing large partnerships) and part IV of subchapter K of chapter 1 of the Code (prescribing the income tax treatment for electing large partnerships), effective for partnership taxable years beginning after December 31, 2017.

Section 1101(c) of the BBA replaces the rules to be removed by sections 1101(a) and (b) with a new partnership audit regime. Section 1101(c) adds a new subchapter C to chapter 63 of the Code, including amended Code sections 6221-6241. The BBA also makes related and conforming amendments to other provisions of the Code.

On December 18, 2015, President Obama signed into law the PATH Act. Section 411 of the PATH Act corrects and clarifies certain amendments made by the

BBA. The amendments under the PATH Act are effective as if included in section 1101 of the BBA, and therefore, subject to the effective dates in section 1101(g) of the BBA.

1. Overview of the New Partnership Audit Regime

Section 6221(a) as added by the BBA provides that, in general, any adjustment to items of income, gain, loss, deduction, or credit of a partnership for a partnership taxable year (and any partner's distributive share thereof) shall be determined, and any tax attributable thereto shall be assessed and collected, at the partnership level. The applicability of any penalty, addition to tax, or additional amount which relates to an adjustment to any such item or share shall also be determined at the partnership level. Section 6221(b) as added by the BBA provides rules for partnerships that are required to furnish 100 or fewer Schedules K-1, Partner's Share of Income, Deductions, Credits, etc., to elect out of this new regime. Generally, a partnership may elect out of the new regime only if each of its partners is an individual, corporation (including certain types of foreign entities), or estate. Special rules apply for purposes of determining the number of partners in the case of a partner that is an S corporation. Section 6221(b)(2)(C) provides that the Secretary by regulation or other guidance may prescribe rules for purposes of the 100-or-fewer-Schedule K-1 requirement similar to the rules for S corporations with respect to any partner that is not an individual, corporation, or estate.

Section 6223 as amended by the BBA provides that the partnership shall designate, in the manner prescribed by the Secretary, a partner or other person with a substantial presence in the United States as the partnership representative who shall have the sole authority to act on behalf of the partnership under subchapter C of

chapter 63 of the Code, as amended by the BBA. In any case in which such a designation is not in effect, the Secretary may select any person as the partnership representative. A partnership and all partners of such partnership shall be bound by actions taken under subchapter C by the partnership and by any final decision in a proceeding brought under subchapter C with respect to the partnership.

Section 6225 as amended by the BBA generally addresses partnership adjustments made by the IRS and the calculation of any resulting imputed underpayment. Section 6225(a) generally provides that the amount of any imputed underpayment resulting from an adjustment must be paid by the partnership. Section 6225(b) describes how an imputed underpayment is determined, and section 6225(c) describes modifications that, if approved by the IRS, may reduce the amount of an imputed underpayment. The PATH Act added to section 6225(c) a special rule addressing certain passive losses of publicly traded partnerships.

Section 6226 as amended by the BBA provides an exception to the general rule under section 6225(a)(1) that the partnership must pay the imputed underpayment. Under section 6226, the partnership may elect to have the reviewed year partners take into account the adjustments made by the IRS and pay any tax due as a result of those adjustments. In this case, the partnership is not required to pay the imputed underpayment. Section 6225(d)(1) defines the reviewed year to mean the partnership taxable year to which the item(s) being adjusted relates.

Under section 6227 as amended by the BBA, the partnership may request an administrative adjustment, which is taken into account in the partnership taxable year the administrative adjustment request (AAR) is made. The partnership generally has

three years from the date of filing the return to make an AAR for that year, but may not make an AAR for a partnership taxable year after the IRS has mailed the partnership a notice of an administrative proceeding initiated with respect to the taxable year.

Section 6231 as amended by the BBA describes notices of proceedings and adjustments, including certain time frames for mailing the notices and the authority to rescind any notice of adjustment with the partnership's consent. Section 6232(a) as amended by the BBA provides that any imputed underpayment is assessed and collected in the same manner as if it were a tax imposed for the adjustment year by subtitle A, except that in the case of an AAR that reports an underpayment that the partnership elects to pay, the underpayment shall be paid when the request is filed.

Section 6234 as amended by the BBA generally provides that a partnership may seek judicial review of the adjustments within 90 days of the date the notice of final partnership adjustment is mailed. Section 6235 as amended by the BBA provides the period of limitations on making adjustments.

Section 6241 as amended by the BBA provides definitions and special rules, including rules addressing bankruptcy and treatment when a partnership ceases to exist. In particular, section 6241(4) as amended by the BBA provides that no deduction is allowed under subtitle A for any payment required to be made by a partnership under the new partnership audit regime.

2. Effective Dates

Pursuant to section 1101(g)(1) of the BBA, the amendments made by section 1101, which repeal the TEFRA partnership procedures and the rules applicable to electing large partnerships and which create the new partnership audit regime,

generally apply to returns filed for partnership taxable years beginning after December 31, 2017. Section 1101(g)(2) of the BBA provides that, in the case of an AAR under section 6227 as amended by the BBA, the amendments made by section 1101 apply to requests with respect to returns filed for partnership taxable years beginning after December 31, 2017. Similarly, section 1101(g)(3) of the BBA provides that, in the case of an election to use the alternative to payment of the imputed underpayment by the partnership under section 6226 as amended by the BBA, the amendments made by section 1101 apply to elections with respect to returns filed for partnership taxable years beginning after December 31, 2017.

Section 1101(g)(4) of the BBA provides that a partnership may elect (at such time and in such form and manner as the Secretary may prescribe) for the amendments made under section 1101 (other than the election out of the new partnership audit regime under section 6221(b) as added by the BBA) to apply to any of its partnership returns filed for partnership taxable years beginning after November 2, 2015 (the date of the enactment of the BBA) and before January 1, 2018.

Explanation of Provisions

This Treasury decision adopts temporary regulations set forth in §301.9100-22T to provide the time, form, and manner for a partnership to make an election pursuant to section 1101(g)(4) of the BBA to have the new partnership audit regime apply to any of its partnership returns filed for a partnership taxable year beginning after November 2, 2015 and before January 1, 2018. Section 301.9100-22T(a) provides the general rule that a partnership may elect at the time and in such form and manner as described in §301.9100-22T for amendments made by section 1101 of the BBA, except section

6221(b) added by the BBA, to apply to any return of the partnership filed for an eligible taxable year (as defined in §301.9100-22T(d)). Accordingly, a partnership that elects to apply the new partnership audit regime to a partnership return filed for an eligible taxable year may not elect out of the new rules under the small partnership exception under section 6221(b) as added by BBA, with respect to that return.

Section 301.9100-22T(a) further provides that an election made not in accordance with these temporary regulations is not valid, and an election, once made, may only be revoked with consent of the IRS. An election is also not valid if it frustrates the purposes of section 1101 of the BBA, which include the collection of any imputed underpayment that may be due by the partnership under section 6225(a) as amended by the BBA. In addition, partnerships may not request an extension of time for making an election described in §301.9100-22T under §301.9100-3.

Section 301.9100-22T(d)(1) generally provides that for purposes of the temporary regulations, an eligible taxable year is any partnership taxable year beginning after November 2, 2015 and before January 1, 2018. Section 301.9100-22T(d)(2) provides exceptions to the definition of an eligible taxable year to avoid proceedings under both the TEFRA partnership procedures and the new partnership audit regime for the same partnership taxable year. To avoid these multiple proceedings, an election under these temporary regulations does not apply if the partnership has taken the affirmative step to apply the TEFRA partnership procedures with respect to the partnership return for that taxable year. This occurs when the tax matters partner has filed a request for an administrative adjustment for the partnership taxable year under section 6227(c) of the TEFRA partnership procedures with respect to a partnership

taxable year. Similarly, an election under these temporary regulations also does not apply if a partnership that is not subject to the TEFRA partnership procedures has filed an amended return of partnership income for the partnership taxable year.

Under the general rule in §301.9100-22T(b), an election to have the new partnership audit regime apply must be made when the IRS first notifies the partnership in writing that a partnership return for an eligible taxable year has been selected for examination (a “notice of selection for examination”). Section 301.9100-22T(b)(1) provides that a partnership that wishes to make an election must do so within 30 days of the date of the notice of selection for examination. The notice of selection for examination referred to in §301.9100-22T(b) is a notice that precedes the notice of an administrative proceeding required under section 6231(a) as amended by the BBA. Section 301.9100-22T(b) provides that the IRS will not issue a notice of an administrative proceeding, which cuts off the partnership’s time for filing an AAR under section 6227 as amended by the BBA, for at least 30 days after it receives a valid election filed in accordance with §301.9100-22T(b). During the period of at least 30 days after the IRS receives a valid election and before the IRS mails the notice of an administrative proceeding, the partnership may file an AAR under section 6227 as amended by the BBA.

Section 301.9100-22T(b)(2) provides that an election must be in writing and include a statement that the partnership is electing to have the partnership audit regime enacted by the BBA apply to the partnership return identified in the IRS notification of selection for examination. The partnership must write “Election under Section 1101(g)(4)” at the top of the statement. The statement must be provided to the

individual identified in the notice of selection for examination as the IRS contact for the examination. In addition, the statement must be dated and signed by the tax matters partner, as defined under section 6231(a)(7) of the TEFRA partnership procedures and the applicable regulations, or an individual who has the authority to sign the partnership return for the taxable year under examination under section 6063 of the Code, the regulations thereunder, and applicable forms and instructions. The statement must include the name, taxpayer identification number, address, and telephone number of the individual who signs the statement, as well as the partnership's name, taxpayer identification number, and tax year to which the statement applies. The statement must include representations that the partnership is not insolvent and does not reasonably anticipate becoming insolvent, the partnership is not currently and does not reasonably anticipate becoming subject to a bankruptcy petition under title 11 of the United States Code, and the partnership has sufficient assets, and reasonably anticipates having sufficient assets, to pay the potential imputed underpayment that may be determined during the partnership examination. The statement must also include a representation, signed under penalties of perjury, that the individual signing the statement is duly authorized to make the election under §301.9100-22T(b) and that, to the best of the individual's knowledge and belief, the statement is true, correct, and complete.

A partnership electing into the new partnership audit regime under the BBA will also be required to designate the partnership representative, as defined in section 6223 as amended by the BBA, and provide the partnership representative's name, taxpayer identification number, address and daytime telephone number, and any other information as required in future guidance regarding the partnership representative.

The Treasury Department and the IRS expect to issue additional guidance regarding designation of a partnership representative, including who is eligible to be a partnership representative, under section 6223 as amended by the BBA.

Section 301.9100-22T(c) provides an exception to the general rule in §301.9100-22T(b) that a partnership may only elect into the new partnership audit regime after first receiving a notice of selection for examination. This exception provides that a partnership that has not received a notice of selection for examination described in §301.9100-22T(b) may make an election to have the new partnership audit regime apply to a partnership return for an eligible taxable year if the partnership wishes to file an AAR under section 6227 as amended by the BBA. Once an election is made under §301.9100-22T(c), all aspects of the new partnership audit regime, except section 6221(b) as added by the BBA, apply to the return filed for the eligible taxable year subject to the election. As with an election under §301.9100-22T(b), an election under §301.9100-22T(c) may not be revoked without consent of the IRS.

An election under §301.9100-22T(c) must be made only in the manner prescribed by the IRS in accordance with the forms and instructions and other guidance issued by the IRS. In no case may an election under §301.9100-22T(c) be made earlier than January 1, 2018. Consequently, an AAR under section 6227 as amended by the BBA may not be filed before January 1, 2018 (except by partnerships that have been issued a notice of selection for examination pursuant to the procedures discussed above). An AAR filed before that date (other than an AAR filed by a partnership that made a valid election under §301.9100-22T(b)) will be treated as an AAR by the partnership under section 6227 of the TEFRA partnership procedures, or as an

amended return of partnership income for partnerships not subject to the TEFRA partnership procedures, and will prevent the partnership taxable year for which the request, or return, is filed from being an eligible taxable year. See §301.9100-22T(d)(2). The Treasury Department and the IRS intend to issue guidance regarding AARs under section 6227 as amended by the BBA before January 1, 2018.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation. These temporary regulations are published pursuant to section 7805(b)(2) of the Code to provide the time, form, and manner for a partnership to make an election pursuant to section 1101(g)(4) of the BBA to have the new partnership audit regime apply to any of its returns filed for a partnership taxable year beginning after November 2, 2015 and before January 1, 2018. Without this necessary guidance, a partnership would not be able to make a valid election pursuant to section 1101(g)(4) of the BBA. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), please refer to the Special Analyses section of the cross-reference notice of proposed rulemaking published in the Proposed Rules section of this issue of the **Federal Register**. Pursuant to section 7805(f) of the Code, these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these temporary regulations is Jenni M. Black of the Office of the Associate Chief Counsel (Procedure and Administration). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 301

Income taxes, Penalties, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 is amended by adding an entry in numerical order to read as follows:

Authority: 26 U.S.C. 7805 ***

* * * *

Section 301.9100-22T is also issued under section 1101(g)(4) of Pub. L. 114-74.

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Paragraph 2. Section 301.9100-22T is added to read as follows:

§301.9100-22T Time, form, and manner of making the election under section 1101(g)(4) of the Bipartisan Budget Act of 2015 for returns filed for partnership taxable years beginning after November 2, 2015 and before January 1, 2018 (temporary).

(a) Election. Pursuant to section 1101(g)(4) of the Bipartisan Budget Act of 2015, Public Law 114-74 (BBA), a partnership may elect at the time and in such form and manner as described in this section for amendments made by section 1101 of the BBA, except section 6221(b) as added by the BBA, to apply to any return of the partnership filed for an eligible taxable year as defined in paragraph (d) of this section. An election is valid only if made in accordance with this section. Once made, an election may only be revoked with the consent of the Internal Revenue Service (IRS). An election is not

valid if it frustrates the purposes of section 1101 of the BBA. A partnership may not request an extension of time under §301.9100-3 for an election described in this section.

(b) Election on notification by the IRS--(1) Time for making the election. Except as described in paragraph (c) of this section, an election under this section must be made within 30 days of the date of notification to a partnership, in writing, that a return of the partnership for an eligible taxable year has been selected for examination (a notice of selection for examination).

(2) Form and manner of making the election--(i) In general. The partnership makes an election under this section by providing a written statement with the words "Election under Section 1101(g)(4)" written at the top that satisfies the requirements of paragraph (b)(2) of this section to the individual identified in the notice of selection for examination as the IRS contact regarding the examination.

(ii) Statement requirements. A statement making an election under this section must be in writing and be dated and signed by the tax matters partner, as defined under section 6231(a)(7) (prior to amendment by the BBA), and the applicable regulations, or an individual who has the authority to sign the partnership return for the taxable year under examination under section 6063, the regulations thereunder, and applicable forms and instructions. The fact that an individual dates and signs the statement making the election described in this paragraph (b) shall be prima facie evidence that the individual is authorized to make the election on behalf of the partnership. A statement making an election must include--

(A) The partnership's name, taxpayer identification number, and the partnership taxable year for which the election described in this paragraph (b) is being made;

(B) The name, taxpayer identification number, address, and daytime telephone number of the individual who signs the statement;

(C) Language indicating that the partnership is electing application of section 1101(c) of the BBA for the partnership return for the eligible taxable year identified in the notice of selection for examination;

(D) The information required to properly designate the partnership representative as defined by section 6223 as amended by the BBA, which must include the name, taxpayer identification number, address, and daytime telephone number of the partnership representative and any additional information required by applicable regulations, forms and instructions, and other guidance issued by the IRS;

(E) The following representations--

(1) The partnership is not insolvent and does not reasonably anticipate becoming insolvent before resolution of any adjustment with respect to the partnership taxable year for which the election described in this paragraph (b) is being made;

(2) The partnership has not filed, and does not reasonably anticipate filing, voluntarily a petition for relief under title 11 of the United States Code;

(3) The partnership is not subject to, and does not reasonably anticipate becoming subject to, an involuntary petition for relief under title 11 of the United States Code; and

(4) The partnership has sufficient assets, and reasonably anticipates having sufficient assets, to pay a potential imputed underpayment with respect to the

partnership taxable year that may be determined under subchapter C of chapter 63 of the Internal Revenue Code as amended by the BBA; and

(F) A representation, signed under penalties of perjury, that the individual signing the statement is duly authorized to make the election described in this paragraph (b) and that, to the best of the individual's knowledge and belief, all of the information contained in the statement is true, correct, and complete.

(iii) Notice of Administrative Proceeding. Upon receipt of the election described in this paragraph (b), the IRS will promptly mail a notice of administrative proceeding to the partnership and the partnership representative, as required under section 6231(a)(1) as amended by the BBA. Notwithstanding the preceding sentence, the IRS will not mail the notice of administrative proceeding before the date that is 30 days after receipt of the election described in paragraph (b) of this section.

(c) Election for the purpose of filing an administrative adjustment request (AAR) under section 6227 as amended by the BBA--(1) In general. A partnership that has not been issued a notice of selection for examination as described in paragraph (b)(1) of this section may make an election with respect to a partnership return for an eligible taxable year for the purpose of filing an AAR under section 6227 as amended by the BBA. Once an election under this paragraph (c) is made, all of the amendments made by section 1101 of the BBA, except section 6221(b) as added by the BBA, apply with respect to the partnership taxable year for which such election is made.

(2) Time for making the election. No election under this paragraph (c) may be made before January 1, 2018.

(3) Form and manner of making an election. An election under this paragraph (c) must be made in the manner prescribed by the IRS for that purpose in accordance with applicable regulations, forms and instructions, and other guidance issued by the IRS.

(4) Effect of filing an AAR before January 1, 2018. Except in the case of an election made in accordance with paragraph (b) of this section, an AAR filed on behalf of a partnership before January 1, 2018, is deemed for purposes of paragraph (d)(2) of this section, to be an AAR filed under section 6227(c) (prior to amendment by the BBA) or an amended return of partnership income, as applicable.

(d) Eligible taxable year--(1) In general. For purposes of this section, the term eligible taxable year means any partnership taxable year beginning after November 2, 2015 and before January 1, 2018, except as provided in paragraph (d)(2) of this section.

(2) Exception if AAR or amended return filed or deemed filed. Notwithstanding paragraph (d)(1) of this section, a partnership taxable year is not an eligible taxable year for purposes of this section if for the partnership taxable year--

(i) The tax matters partner has filed an AAR under section 6227(c) (prior to amendment by the BBA),

(ii) The partnership is deemed to have filed an AAR under section 6227(c) (prior to the amendment by the BBA) in accordance with paragraph (c)(4) of this section, or

(iii) An amended return of partnership income has been filed or has been deemed to be filed under paragraph (c)(4) of this section.

(e) Applicability date. These regulations are applicable to returns filed for partnership taxable years beginning after November 2, 2015 and before January 1, 2018.

(f) Expiration date. This section will expire on August 5, 2019.

John M. Dalrymple,
Deputy Commissioner for Services and Enforcement.

Approved: July 6, 2016

Mark J. Mazur
Assistant Secretary for Tax Policy
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